Supreme Court, U. S.
FILED
OCT 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-696

LEONARD JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

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To the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO SUBMIT PETITION FOR WRIT OF CERTIORARI OUT OF TIME

To the Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States:

Petitioner moves that he be allowed to file a petition for writ of certiorari instanter, to review the judgment of the Seventh

Circuit Court of Appeals, entered on the 10th day of March, 1977, in the cause pending therein entitled *United States of America v. Leonard Johnson*, Seventh Circuit Court of Appeals No. 75-1678. The Opinion of the Seventh Circuit in the instant case; the Statement of the Case; the Questions Presented for Review; and the Jurisdictional Statement are all contained in the instant Petition.

REASONS FOR GRANTING LEAVE TO SUBMIT PETITION FOR WRIT OF CERTIORARI OUT OF TIME

I

Petitioner was tried and convicted of violations of 18 U.S.C. § 2, 1341, 1951, 1961, 1962, and 1963, in the United States District Court, Eastern District of Illinois, No. 74-97-E. The case was duly appealed, and the Seventh Circuit Court of Appeals, in its opinion filed on April 15, 1977, upheld petitioner's convictions on all counts (4). (Appendix, P. A-1).

II

Thereafter, on August 22, 1977 the Seventh Circuit Court of Appeals denied petitioner's Motion for Rehearing (Appendix, P. A-9), which had been filed on or about May 11, 1977.

III

Petitioner concedes that his Petition for Writ of Certiorari is filed out of time. Petitioner, however, does state that the Seventh Circuit Court of Appeals did not rule on his Motion for Rehearing for three months from the date of its filing, which

was a considerably longer period of time than that of the other appellants tried together in this case. Furthermore, petitioner firmly believes, as stated in the present petition, that the Seventh Circuit Court of Appeals failed to adequately consider the issues raised in his original appellate brief. In ruling on Petitioner's challenge to the sufficiency of the evidence on all counts, the Court of Appeals lumped all Appellants together and did not recognize the basic difference between petitioner's administrative duties with School District 189, and the duties of the rest of appellants, all of whom were School Board members (elected officials with the power to approve or disapprove payments of public funds) except one. In so doing, said Court of Appeals did not rule on petitioner's main point—namely, that the Government did not prove that petitioner had, or appeared to have, the actual or legal power to cause materials to be mailed in furtherance of a scheme to defraud or to carry out an extortionate scheme. These issues, along with the others raised in the instant Petition, present vital questions of federal statutory and constitutional law and should be ruled on by this Court.

IV

Petitioner has been sentenced to two 18 months sentences, to run concurrently in the custody of the Attorney General; to two suspended impositions of sentence, with three years probation, to run concurrently with the aforesaid 18 month sentences; and to a fine of $5,000.

Respectfully submitted,

RAYMOND HOWARD
Attorney for Petitioner
Leonard Johnson

State of Missouri }
City of St. Louis } ss.

Raymond Howard, being duly sworn, under oath, states that he is the attorney of record for petitioner, Leonard Johnson, and that the foregoing is correct and true to the best of his knowledge, belief, and information.

Raymond Howard

Subscribed and sworn to before me this . . . day of . . . . . , 1977.

. . . . . .
Notary Public

My Commission Expires: . . . . . .

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. . . . . .

LEONARD JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
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To the United States Court of Appeals for the Seventh Circuit

Petitioner, Leonard Johnson, prays that a Writ of Certiorari issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on the above-captioned cause on April 15, 1977; petition for rehearing en banc being denied on August 22, 1977.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix, P. A-1) is not yet reported. There was no opinion filed by the

District Court; the judgment of the District Court is reported in this Petition (*infra*, p. 8). Petitioner's Motion for Rehearing was denied by the Court of Appeals (Appendix, P. A-9).

JURISDICTION

The judgment of the Court of Appeals (Appendix, P. A-1) was entered on April 15, 1977. Petitioner Johnson's Petition for Rehearing En Banc was filed on or about May 12, 1977 and was denied on August 22, 1977 (Appendix, P. A-9). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the evidence admitted at trial was sufficient to support the jury's verdict of guilty of violations of Title 18, United States Code, Sections 1951, 1961, 1962, 1963 by petitioner, Leonard Johnson, as alleged in Counts XV and XXI of the Government's indictment.

II. Whether the evidence admitted at trial was sufficient to support the jury's verdict of guilty of violations of Title 18, Unted States Code, Sections 2, 1341, 1961, 1962, 1963 by petitioner, Leonard Johnson, as alleged in Counts VIII and XXI of the Government's indictment.

III. Whether the evidence admitted at trial was sufficient to support the jury's verdict of guilty of a violation of Title 18, United States Code 1623, as alleged in Count XIX of the Government's indictment.

IV. Whether the court erred in failing to dismiss Count XXI of the Government's indictment, which alleges, *inter alia*, violations of Title 18, United States Code, Sections 1951, 1961, 1962, and 1963, by petitioner, Leonard Johnson, for the reason that Count XXI is fatally defective in that said count is vague, repetitious, and in violation of the rules of criminal procedure and the Constitution.

STATEMENT OF THE CASE

The instant case was a criminal prosecution tried in the United States District Court for the Eastern District of Illinois, No. 74-97-E, before the Honorable James L. Foreman. The jury trial began on February 10, 1975 and lasted two weeks. Six defendants, including petitioner, were charged in a twelve count indictment. Four of the defendants—Charles Merritts, Harry Tharp, Fred Kimbrough, and Roosevelt Peabody—were members of the East St. Louis School Board. Petitioner Leonard Johnson, Business Manager, and defendant Raymond Cason, Purchasing Agent, were employees of School District 189 (E. St. Louis). The indictment, in essence, arose out of an alleged "kickback" scheme, whereby the defendants used their public positions of authority to grant concessions to two vendors in return for money and gifts.

The original indictment contained twenty-one Counts, but, prior to trial, the Government filed a motion requesting the trial court to separate Counts VIII, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, IXX, XX, and XXI for purposes of trial. This motion was granted. Petitioner was charged, in Count VIII, along with Merritts, of mail fraud. Petitioner was charged in Count XV with a violation of 18 U.S.C. § 1951 (racketeering relating to interference with commerce, robbery, or extortion) and was charged in Count IX with perjury before a Grand Jury. In Count XXI, all six defendants were charged at least with violations of 18 U.S.C. 2, 1961, 1962, and 1963, although

there is some disagreement over the contents of Count XXI, which will be discussed herein.

Petitioner was found guilty on Counts VIII, XV, XIX, and XXI and was sentenced to eighteen months and fined $5,000. Petitioner duly appealed, and, the Seventh Circuit Court of Appeals, on April 15, 1977, affirmed petitioner's conviction. Petitioner's Motion for Rehearing was denied on August 22, 1977.

There is some agreement as to the facts surrounding petitioner's indictment and conviction. It is agreed that petitioner was, at all relevant times mentioned herein, the business manager for School District 189 (T. 2098); that petitioner knew of Marvin Schwartz, vendor furnishing supplies to School District 189 (T. 2112); and that petitioner and James Kammermeyer, also a vendor furnishing supplies to School District 189, were friends from 1973 to the time of trial. (T. 2124-2130). Also, James Kammermeyer, the Government's main witness against petitioner, first stated that petitioner controlled cash disbursements from the School District to the various vendors supplying it with goods (T. 1382), but he later admitted that it was the School Board that controlled said disbursements, not petitioner. (T. 1408, 1580, 1601, 1602, 1650, 1652). This corresponds to petitioner's testimony. (T. 2118-2120, 2136-2142).

A. Count XV (Extortion) and Count XXI (Racketeering)

In Count XV of the Government's indictment (which is realleged in Count XXI), petitioner is accused of receiving a $1,500.00 kickback payment on July 23, 1974, from James W. Kammermeyer, a vendor selling goods to School District 189. Though not mentioned in Counts XV and XXI, the Government also attempted to show that petitioner received a total

of $3,000 in kickback payments from Kammermeyer in June and July, 1974 (T. 1381-1391).

At trial, Mr. Kammermeyer did testify that he gave $1,000.00 to petitioner in June, 1974 (T. 1383) and stated that the money was paid because of ". . . an overpayment to my company of a substantial amount . . .", which petitioner was aware of (T. 1384). In regard to the $1,500.00 kickback, Kammermeyer stated that he paid petitioner this amount on July 23, 1974 in order to ". . . complete a kickback liability I had incurred." (T. 1391). There were no cancelled checks offered by the Government corroborating the payment of said sums of money, nor did petitioner's name appear anywhere in Kammermeyer's business records. (T. 1613). Petitioner denied ever having received any money from Kammermeyer. (T. 2120-2123).

Kammermeyer testified that there was a meeting between himself, Mr. Peabody and petitioner in May,. 1974, but there was no money paid to anyone at this meeting. Also, Kammermeyer assured petitioner's counsel that certain taped conversations between himself and petitioner would reveal petitioner's wrongdoing. (T. 1619). Said conversations were taped by Kammermeyer, and petitioner did not know that he was being recorded. (T. 1849). The tapes were played during trial, and Kammermeyer admitted, after said tapes were played, that petitioner had not asked for any money from Kammermeyer during said conversations. (T. 1848).

Though not mentioned in Counts XV and XXI, Kammermeyer stated at trial that he had purchased some golf clubs for petitioner. (T. 1607-1609). Petitioner denied this. (T. 1227). The Government, during rebuttal, called Tim Davenport, a golf professional, to rebut petitioner's testimony and to identify the person that received golf clubs which were paid for by Kammermeyer. Davenport identified defendant Cason, not petitioner. (Separate Transcript of Davenport's testimony).

B. **Count XIX (Perjury)**

Petitioner appeared as a witness before the Federal Grand Jury investigating kickbacks and racketeering in East St. Louis, Illinois. On October 2, 1974, petitioner testified before the Grand Jury as follows, to-wit:

"Q. Have you ever received any money from any vendors for your personal benefit?

A. No.

Q. Have you ever requested from any vendors——

A. No.

Q. ——money for your own personal benefit?

A. No.

Q. You never received any money from Mr. Kammermeyer?

A. No.

Q. Are you on a monthly salary, are you getting a monthly salary from any vendors doing business with the School District?

A. Absolutely not."

The above-cited testimony was read into evidence at trial by the Government's counsel. (T. 1867). The factual basis for the Government's charge has already been discussed in part herein (**Statement of the Case,** Part A); the remainder will be mentioned herein in **Statement of the Case,** Part C.

C. **Count VIII (Mail Fraud) and Count XXI (Racketeering).**

Marvin Schwartz was the Government's chief witness at trial concerning the charge of mail fraud against petitioner. Schwartz was the owner of Lehman Sheet Metal, Inc. (T. 886). This

company performed general and mechanical work for School District 189 (T. 885); the majority of the work performed was on the boilers located at the schools within said district.

At trial Mr. Schwartz testified that in the first part of March, 1974, he and Charles Merritts met and discussed a method of raising $10,000.00 needed by Merritts for his school board election campaign (T. 886); that, at said meeting, it was decided that a fictitious invoice for $5,000.00 would be submitted to petitioner (T. 888); and that, after said meeting, Schwartz directed his bookkeeper/secretary to prepare and submit a fictitious invoice in the amount of $5,000.00 to School District 189 directed to petitioner. (T. 984). This invoice was never mailed.

Schwartz testified that he spoke with petitioner in the second week of March, 1974, and then met again with Merritts because petitioner ". . . seemed skeptical to handle the paper." (T. 891); and that, after the second meeting with Merritts, Schwartz directed his secretary to mail five fictitious invoices to School District 189 in care of or directed to petitioner. (T. 983) These invoices were admitted into evidence as Government's Exhibits Nos. 2a-2e. (T. 920). Also, Schwartz stated that he received a check for the false invoices, said check was admitted as Government's Exhibit No. 5A (T. 875).

During his testimony, however, Schwartz admitted that petitioner was not at the first meeting between himself and Merritts (T. 973); that, up to that time, Schwartz knew of no wrongdoing by petitioner prior to the first meeting (T. 972); and that petitioner did not have knowledge of the aforesaid scheme prior to or during the first meeting. (T. 973).

As to the conversation between Schwartz and petitioner after the first meeting, Schwartz, after some contradiction in his testimony, finally admitted that he thought that the person that he talked to over the phone was petitioner because his secretary

had told him it was petitioner. (T. 976). (Petitioner denied any such conversation.) (T.2110).

As to the five alleged fictitious invoices, Schwartz did not actually know who they were mailed to (T. 985); that the address on the invoices themselves was not petitioner's business address but that of the Director of Buildings and Grounds, located on a completely different street in East St. Louis (T. 989); and that, in the normal course of business, Schwartz would send invoices to the Director of Buildings and Grounds, in order that said Director could make sure the work listed in the invoices had been done. (T. 990). The five alleged fictitious invoices were examined at trial and did contain all of the proper signatures and notations of the various departments of School District 189 and had been approved by the Board of Education. (T. 990, 994, 2118).

As to the second meeting with Merritts, petitioner was not present then either, according to Schwartz. (T. 891). Schwartz stated that the check he received as a result of the false invoices ($4,498.48) came through the mail, but he did not have the envelope that the check came in, even though at that time he was gathering evidence for the FBI. (T. 995-997). Schwartz stated that he did not know if the check was mailed by petitioner or at petitioner's direction and was in fact mailed pursuant to the order of the Board of Education. (T. 997).

Petitioner, testifying in his own behalf, stated that his job was to co-ordinate the activities and paper work of the various departments involved such as the financing department, the purchasing department, the transportation department, the food department and the Superintendent of the 189 School Board (T. 2133). Due to the large volume of work to be co-ordinated defendant Johnson was to sign purchasing orders on the basis of the completion of correct formalities (T. 2134). The same was true of checks approved by the Board of Education for

School District 189. It was the function of the Department of Buildings and Grounds to inspect to see if the work by contractors was properly performed and to approve or disapprove on that basis (T. 2099). Defendant Johnson had no vote on the Board of Education for 189 with regard to the approval or issuance of payment checks to Lehman, Inc. (T. 2105) as evidenced by government Exhibit 1F, the June 28, 1974 statement of the Official Proceedings of the Board of Education for School District 189. The aforesaid procedure, concerning the payment of invoices, outlined in petitioner's testimony was corroborated by Schwartz. (T. 996-998).

As noted earlier herein, the allegations in Count VIII were incorporated by reference into Count XXI and formed part of the basis for the charges contained therein.

REASONS FOR GRANTING THE WRIT

Point I

The Seventh Circuit Court of Appeals has decided on an important question of federal law, and their decision directly conflicts with the holdings of other United States Circuit Courts of Appeals. This Court should settle this controversy so that the same rule of law may be uniformly applied throughout the United States.

The Government failed to offer sufficient evidence to prove all of the elements necessary to convict petitioner of violating 18 U.S.C. § 1951, as alleged in Counts XV and XXI of the Government's indictment. These charges should not have been submitted to the jury, and petitioner's motion for acquittal at the close of all of the evidence should have been sustained.

This point has been properly preserved for review and was dealt with, after a fashion, by the Court of Appeals. They held as follows, to-wit:

> "All defendants argue that there was insufficient evidence to support their convictions. We find, however, that the evidence adduced does not support this claim, and was sufficient to support the jury's verdict. *It is not the function of this court to weigh the credibility of the witness' testimony, that is the function of the jury.*" (emphasis added); (Appendix to this Petition, P. A-7).

Of course, a reviewing court does not weigh the credibility of the witness' testimony; however, petitioner did not request the Court of Appeals to weigh the testimony, nor does he make that request in this Petition. Petitioner *does* maintain that the Government, at trial, failed to show that, at the time of the alleged crime, petitioner, as business manager of School District 189, had the necessary *de jure* or *de facto* power, or appeared

to have said powers, to grant or deny payment of invoices, which were regular and complete on their face, by said school district. This is an essential element of proving extortion "under color of official right" as charged in Counts XV and XXI.

To narrow the issue, it should be repeated that the evidence at trial *clearly* demonstrated that petitioner did not have the *de jure* or *de facto* power to approve the payment of invoices submitted by various vendors to School District 189. This was the duty of the School Board; also, it was not shown that petitioner had any legal or actual power over the School Board's approval of invoices. Petitioner had an administrative job: If the invoices had the proper signatures and notations on them when he received them, he *had* to sign them. If invoices were false—if, as here, they allegedly represented bills for work undone—it was the responsibility of the Director of Building and Grounds to uncover this *before* said Director signed the invoices. There was no proof that petitioner approved any invoices from Kammermeyer which were irregular on their face; there was no evidence that petitioner had improperly and illegally used the powers of his office, as those powers were defined at trial.

Therefore, for petitioner to be convicted, it was necessary for the Government to show that petitioner *appeared*, to James Kammermeyer, to have the legal or actual power to have the alleged fictitious invoices approved. This interpretation is supported by recent decisional law:

> ". . . [T]he jury need not have concluded that he had the actual *de jure* power to secure grant of the lease so long as it found that Kelly held, and defendant exploited a reasonable belief that the state system so operated that the power in fact of defendant's office included the effective authority to determine recipients of the state leases here involved." *United States v. Mazzei*, 521 F2d 639, 643 (3d Cir. 1975).

The Tenth Circuit Court of Appeals also adheres to this holding. *United States v. Brown*, 540 F2d 364, 372 (10th Cir. 1976).

At trial, during the direct examination of James Kammermeyer by Government counsel, the following question and answer were given:

> "Q. Mr. Kammermeyer, what reason did you give the money to Mr. Johnson?
>
> A. Because Mr. Johnson controlled the actual disbursing of cash to my company. In order to get this cash on a timely basis without any interference, it was necessary that I pay Mr. Johnson money." (T. 1832).

This testimony, without more, would appear to be sufficient; however, Kammermeyer *himself* recanted the above-cited testimony. Later, during cross-examination, he stated that, at all times relevant to the charges against petitioner, he (Kammermeyer) knew that the School Board, not petitioner, controlled cash disbursements to him. (T. 1408, 1580, 1601, 1602, 1650).

The argument may be made that, by considering Kammermeyer's testimony on cross-examination, a court on review is weighing the credibility of Kammermeyer's testimony, but this is absurd. If the sole prosecution witness testified at a burglary trial that the defendant was the one who committed the crime, and then later, on cross-examination "corrects" his testimony and admits that the defendant was not the burglar, it is inconceivable that any judge, state or federal, would not grant defendant's motion to acquit for insufficiency of the evidence. In order to have sufficient evidence, there must be substantial evidence—i.e., ". . . the evidence must be such that a jury might reasonably conclude it sufficient to exclude every reasonable hypothesis but that of guilt." *United States v. Garza*, 426 F.2d 949, 953 (5th Cir. 1970). How can a jury be expected to do this when the Government's witness admits that the facts contained in his earlier testimony are untrue?

Apart from this element of authority and "apparent authority", Kammermeyer contradicted himself on other points as well. The only evidence that petitioner received cash kickback payments and other gifts from Kammermeyer was Kammermeyer's testimony; there were no checks, letters, business records or any other competent evidence. Kammermeyer, at trial, assured everyone in the courtroom that certain taped conversations (taped by Kammermeyer) would reveal that petitioner had received money and gifts. These tapes were played and revealed nothing. The matter of the "purchased" golf clubs has already been detailed; it would be comic except for the serious nature of the charges.

Even viewing the evidence in a light most favorable to the Government, Kammermeyer's testimony, concerning the alleged illegal acts of petitioner, was worthless. Thus, by holding that there was sufficient evidence to convict petitioner on the aforementioned charges, the Seventh Circuit Court of Appeals either disregarded, or disagreed with, the rule of law announced by both the Third and Tenth Circuit Courts of Appeals.

Point II

The Seventh Circuit Court of Appeals has decided on an important question of federal law, and their decision directly conflicts with the holdings of another United States Circuit Court of Appeals. This Court should settle this controversy so that the same rule of law may be uniformly applied throughout the United States.

In *United States v. Grow*, 394 F.2d 182, 198, 199 (4th Cir. 1968), it was held that, in order to present sufficient evidence for a conviction of mail fraud, the Government must prove that the defendant, or that a person whose actions may be attributable to defendant, had the requisite power to cause the

mailing of a letter or any other material in the furtherance of a scheme to defraud.

In the instant case, petitioner had no such power. Once again, petitioner merely signed invoices containing the proper signatures and notations. If a *majority* of the school board (not just Merritts) approved payment, a check would be mailed out; if not, payment would not be forthcoming. (There was no proof that petitioner could influence the vote of a majority of the school board members, or, for that matter, any of the school board members.) Schwartz himself admitted all of this at trial. Also, the invoices submitted by Schwartz; signed by petitioner; and admitted at trial were regular on their face.

Furthermore, Schwartz, at trial, said he thought that the five fictitious invoices, which were mailed, were "directed to" petitioner. (Government's Exhibits 2A-2E). There was no proof of this. Schwartz testified that he merely told his secretary to put "Attention: Leonard Johnson" on the envelope or envelopes; whether she did or not is anyone's guess since the envelope or envelopes containing the invoices was never produced. Also, the address on the invoices themselves was petitioner's address and his name appeared nowhere on the invoices. Lastly, Schwartz testified that, in the normal course of business, he would not mail invoices to petitioner.

Mr. Justice Minton, in his dissenting opinion in *Pereira v. United States*, 347 U.S. 1 (1954), stated that ". . . piling inference upon inference . . . is simply guessing . . . [and] . . . [i]t may be good guessing but it is not proof," *supra*, at 15. In the present case, any inferences of guilt are totally overcome by the direct testimony of Schwartz; in short, good guessing has given way to wild speculation.

As before, the Seventh Circuit Court of Appeals' opinion in the instant case is at odds with the holding of a different Circuit Court of Appeals. It should be noted that, if petitioner's conviction of violations of 18 USC §§2, 1341, and 1951 cannot stand, his conviction of 18 USC §§1961, 1962, 1963, and 2. This is obvious from a glance at the Government's indictment and the aforesaid statutes.

Point III

The Seventh Circuit Court of Appeals has decided an important question of federal law, and their decision directly conflicts with the holdings of other United States Circuit Courts of Appeals. This Court should settle this controversy so that the same rule of law may be uniform throughout the United States. Furthermore, the Seventh Circuit Court of Appeals' decision failed to follow the holding of this Honorable Court and, if allowed to stand, will create confusion and uncertainty in this area of federal law.

Under the case law, clear, convincing and substantial evidence, which excludes every other reasonable hypothesis, must be established to support a conviction of perjury. *Van Liew v. United States*, 321 F2d 674 (5th Cir. 1963); *United States v. Brandyberry*, 438 F2d 226 (9th Cir. 1968); *Rocca v. United States*, 337 F2d 39 (8th Cir. 1964).

In the instant case, the Government failed to prove that petitioner ever received any money for his personal benefit from any vendors; the reasons for this assertion were set forth earlier herein and their repetition would serve no useful purpose. The Seventh Circuit Court of Appeals' decision on this matter is contrary to the decisions of other Circuits on similar cases.

Moreover, the Seventh Circuit ruling does not square with *Bronston v. United States*, 409 U.S. 354 (1973). In *Bronston*, this Court held that a person may not be convicted of perjury when the testimony, on which the conviction is based, is unresponsive. If a defendant's answer to a material question

causes confusion or is not clear, or is not responsive, it is the duty of the questioner ". . . to press on for the information he desires." *Bronston, supra,* 409 U.S. at 362. If he fails to do so, the conviction, for perjury, of the person questioned is not the proper remedy.

In the present case, the Government's Grand Jury interrogation was in part ambiguous and lacking in specificity:

> "Q. You never received any money from Mr. Kammermeyer?"
>
> "A. No." (T. 1867)

Petitioner's response of "No" created a double negative. The question was phrased in a form of a negative statement, which we can only assume was to receive either a negative or affirmative response. When appellant answered, "No," the logical meaning of his reply was "Yes, I received money from Kammermeyer." That the Government failed to inquire as to how much was received; that it was for petitioner's personal benefit; that it related to his employment—all are a matter of conjecture and speculation. The Government did not even ask if petitioner understood the question or what petitioner's answer implied. Count XIX of the indictment alleges that petitioner committed perjury in stating that he received no money from Kammermeyer; yet, the answer to the very same question before the Grand Jury is "Yes, I did receive money . . .". Needless to say, confusion abounds and ". . . [a] jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; . . ." *Bronston, supra,* 409 U.S. at 359.

Point IV

The Seventh Circuit Court of Appeals has decided an important question of federal law, and their decision fails to follow the holding of this Court.

Rule 7(c)(1), Fed. R. Crim. P., 18 U.S.C. states, in part, that an ". . . indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." This Court has held that the Government cannot alter the charges in its indictment by proving offenses not set forth in said original indictment. *Stirone v. United States,* 361 U.S. 212 (1959). In *United States v. Trotta,* 525 F2d 1096 (2d Cir. 1975), in ruling on the sufficiency of an indictment, cited the opinion delivered by this Honorable Court in *Hamling v. United States,* 418 U.S. 817 (1974):

> "'. . . [A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Trotta, supra,* 525 F2d at 1098.

Count XVI of the Government's indictment in the instant case falls woefully short of the standards mentioned in the aforecited rules and cases. The Government, as the basis for its charge of a violation of 18 U.S.C. §§ 1961, 1962, 1963 and 2, alleged that petitioner violated 18 U.S.C. §§ 1341, 1951, and 2 and, in that regard, incorporated, *inter alia,* Count XV and Count VIII into Count XXI; also, Count XXI also alleges that petitioner, as well as the other five defendants, "from on or about April, 1974" to the time of the filing of the Government's indictment, committed other acts—the date and precise nature of the acts unspecified—in violation of 18 U.S.C. § 1951 (Appendix to this Petition, p. A-10). (From the language of Count XXI, it is hard to tell if petitioner was also charged with mail fraud "crimes", apart from those stated in Count VIII, but it is possible that he was).

In holding that Count XXI was sufficient and not contrary to law, the Seventh Circuit stated that Count XXI stated a spe-

cific period of time within which the illegal acts were supposed to have happened, thereby preventing any double jeopardy problems. With all due respects, petitioner begs to differ. Is March 31, 1974 "on or about April, 1974"? Is March 30 or March 29? Is April 2 included? If they all are, then petitioner has no worries; but how can he (or anyone) tell what dates or acts are or are not included? He cannot. No one can.

Moreover, the Seventh Circuit held that petitioner was given an opportunity for full discovery and should have been aware of the events testified to at trial. This is not true because the alleged payments made by James Kammermeyer to petitioner were in the form of cash. Petitioner, during discovery, was given, the cancelled checks (and other records), but they meant little, since petitioner's name did not appear anywhere on any checks and records. Petitioner was left in the dark as to the dates of the alleged payments; the number of alleged payments; and the amounts of each alleged payment. This, coupled with the vague time period contained in Count XXI, made it impossible to prepare an adequate defense. During trial, petitioner did object and claim surprise. (e.g., T.1386).

Count XXI was fatally defective. It failed to meet the requirements of the 5th and 6th amendments of the Constitution, as those amendments have been interpreted by this Honorable Court.

CONCLUSION

In order to establish that a criminal defendant committed extortion under color of official right in violation of 18 U.S.C. §1951, it is essential that the Government prove that defendant had the actual or legal authority to carry out the alleged extortionate scheme, or at least appeared to have said powers.

Without proof of this element, a defendant must be acquitted. Petitioner should have been acquitted on this charge.

Likewise, it was incumbent upon the Government to show that petitioner had the requisite power and authority to cause material, relevant to the charged fraudulent scheme, to be mailed. This was not done.

Further, the Government failed to prove that petitioner perjured himself—i.e., that he illegally accepted money or gifts; also, as here, there can be no conviction for perjury based upon unresponsive answers to imprecise questions.

An indictment must be framed so as to protect a defendant from double jeopardy and to adequately inform him of the charges against him. In the instant case, Count XXI failed to meet this standard. Petitioner should not have been convicted on Count XXI for another reason as well: There was insufficient evidence offered at trial, on said Count.

Therefore, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Unpublished Order Not to Be Cited Per Circuit Rule 35

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued February 22, 1977

April 15, 1977

Before

Hon. Luther M. Swygert, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. A. Sherman Christensen, Senior District Judge*

United States of America, Plaintiff-Appellee, v. Nos. 75-1677 through 75-1681, and 76-1761 Raymond Cason, Leonard Johnson, Dr. Fred Kimbrough, Roosevelt Peabody, Harry Tharp, and Ben Phillips, Jr., Defendants-Appellants.	Appeals from the United States District Court for the Eastern District of Illinois. No. 74-CR-97-E James L. Foreman, Judge.

ORDER

These appeals are from jury verdicts of conviction of the defendants for participation in a kickback conspiracy involving

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* The Honorable A. Sherman Christensen, United States Senior District Judge for the District of Utah at Salt Lake City, is sitting by designation.

the Board of Education of East St. Louis, Illinois. Defendant Ben Phillips, Jr., whose trial was severed from that of the others, was charged with violation of 18 U.S.C. §§ 1951 and 1952. The other defendants were charged, in a twenty-one count indictment, with various violations of 18 U.S.C. §§ 2, 1341, 1623, 1951, 1961, 1962, and 1963. Defendants Charles Merritts, Sr., Harry Tharp, Dr. Fred Kimbrough, and Roosevelt Peabody were members of the school board. Defendants Leonard Johnson and Raymond Cason were, respectively, the business manager and the purchasing agent for the East St. Louis School Board. Phillips was allegedly employed by one of the vendors involved for the purpose of "laundering" money paid to Merritts.

The Government's chief witnesses were James W. Kammermeyer and Marvin C. Schwartz, vendors doing business with School District No. 189. Both witnesses were granted immunity from prosecution in exchange for their testimony. Kammermeyer and Schwartz both testified to the existence of the kickback scheme, and to numerous meetings with the defendants to discuss arrangements. Involved in the operation of the scheme were the use of fictitious invoices, fictitious purchase orders, and numerous payoffs by the vendors, in goods as well as money, some of the latter being laundered through Phillips.

The defendants have argued many points as error, and we will address each in turn. We do not, however, find any of their arguments to be of merit.

Defendant Phillips was charged with aiding and abetting Merritts in obtaining property from a vendor, with the vendor's consent, induced under color of official right which affected commerce, in violation of 18 U.S.C. § 1957 and § 1952, between June 1973 and December 1973. At Phillips' separate trial Kammermeyer testified that Phillips was employed to serve as payee of Kammermeyer's checks for money paid to Merritts. Phillips would cash the checks and deliver the money to Merritts. Kammermeyer set up a tax escrow account for Phillips of roughly thirty percent of these amounts. Phillips' first objection is to the receipt of Kammermeyer's record book into evidence under the business records exception to the hearsay rule. The book contained records of kickback payments and the tax escrow. Phillips claims that it was improperly admitted because it was not made as a regular part of Kammermeyer's business. This contention is without merit. Kammermeyer testified that he was the custodian of the book and that the entries were made by him or at his direction. He further testified that making kickbacks was not only a part of his business, but a very high percentage of that business. The situation is clearly included in both the Federal Business Records Act, 28 U.S.C. § 1732(a), and Federal Rule of Evidence 803(6); its reliability was thus established.

Phillips next claims that an effect upon commerce was not sufficiently proved. Kammermeyer's testimony that he made purchases from suppliers in states other than Illinois and Missouri and assigned his "Accounts Receivable" outside these states is sufficient to satisfy the commerce element of the Hobbs Act. In *Stirone v. United States*, 361 U.S. 212 (1960), the Supreme Court stated that the broad language of the Hobbs Act "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion. . . ." 361 U.S. at 215. This court has further held that the commerce element is satisfied where there exists a "realistic probability that an extortionate transaction will have some effect on interstate commerce," even though the record shows no actual effect. **United States v. Staszcuk,** 517 F.2d 53, 60 (7th Cir. 1975). In the instant case, there was sufficient evidence to support the commerce element of the charge.

In his final argument Phillips contends that the district court erred in reopening the prosecution's case in rebuttal for newly discovered evidence. He contends that this evidence had been

in the Government's possession and, in fact, used as an exhibit in a previous trial. This assertion is completely unsupported by the facts. We find no abuse of discretion in the court's permitting the Government to reopen rebuttal.

Merritts, tried with the other defendants, is not a party to this appeal. Various defenses were raised by some or all the defendants in the second case. We will address each separately.

Defendants contend that an agent of the Federal Bureau of Investigation was improperly present in the grand jury room during its consideration of this case, for the purpose of rendering technical assistance to the grand jury. It has not been asserted that the agent was present during the grand jury's deliberation or voting on the indictment. Moreover, this claim is totally unsupported, as no evidence has been submitted by defendants to indicate his presence.

We find the challenge to the trial jury's array, that there was a too-high percentage of women, to be similarly without merit. The district court held an evidentiary hearing on this issue and found no prima facie showing of wrongdoing. There was no showing of knowing and intentional exclusion of any juror based upon race, sex, age, or other factor.

Defendants argue that because the evidence in this case was so lengthy and complicated, and because there were so many defendants involved, their trials should have been severed. The trial court carefully cautioned the jury each time testimony was received for merely a limited purpose or against only certain defendants, and carefully instructed the jury before it retired. This trial was a long one—two weeks. If severance had been granted, it would necessitate six separate complicated trials with duplicitous testimony. Severance is a matter within the sound discretion of the trial court; under these circumstances we cannot conclude that the district court abused this discretion.

The evidence presented by the prosecution was sufficient to establish, independent of hearsay declarations by any of the defendants, a continuous scheme of extortion to which all the defendants were joint venturers. Once such a joint venture has been established, hearsay declarations made in furtherance of the scheme by any member are admissible against another member. *United States v. Buschman*, 527 F.2d 1082 (7th Cir. 1976). Such hearsay declarations were, thus, properly admitted into evidence. Defendants contend that there existed, if any, only multiple conspiracies rather than the one single conspiracy charged. As previously indicated, the evidence sufficiently showed one single scheme to extort kickbacks from the vendors. Moreover, there was sufficient evidence to prove that those defendants charged with conspiracy to extort, Merritts, Kimbrough, Peabody, and Tharp, did so conspire. The evidence shows that in May 1974 three of the four met at Kammermeyer's office, the furth being called on the telephone, to discuss the manner in which to carry out the conspiracy. During this meeting all four either demanded payment from Kammermeyer, or gave instructions for him to follow in furtherance of the conspiracy. This evidence shows that all knew of and actively joined the conspiracy. It is well settled that the parties to a conspiracy may change; one can leave a conspiracy or join an ongoing one. This does not mean that there are separate conspiracies. *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969). Thus the contentions of Peabody and Tharp, who did not become school board members until April 1974, after the initial dates charged in the indictment, that they cannot be charged with that conspiracy are without merit.

Defendants argue that they were prejudiced by references in the Government's opening statement that it would prove its case through tape recordings of the defendants. These tapes, made by bugging one of the testifying vendors during meetings with defendants, were never offered by the Government for admission. The Government claims that this was due to their

poor sound quality, the necessity for complicated editing, and resulting problems of establishing a foundation. Considering the trial court's instructions to the jury, remarks by the Government attorney that statements by counsel are not evidence, and the rest of the evidence adduced, we cannot say that these references were manifestly prejudicial to the defendants. *Frazier v. Cupp*, 394 U.S. 731, 736 (1969); *United States v. Woodring*, 446 F.2d 733, 737 (10th Cir. 1971).

These same tapes were offered into evidence by defendant Kimbrough as cross-examination of Kammermeyer. Several of his codefendants objected to their admissibility on grounds of prejudice to them, Kimbrough's lack of standing to move for their admission, and lack of proper foundation. The Government also objected to their use for reasons that they were beyond the scope of direct examination of Kammermeyer, that they were of poor sound quality, and that they did not include all relevant time periods. We find that the trial court did not abuse its discretion to limit the scope of cross-examination into collateral matters. *United States v. Bender*, 218 F.2d 869, 873-74 (7th Cir. 1955), *cert. denied*, 349 U.S. 920 (1955); *United States v. Lehman*, 468 F.2d 93 (7th Cir. 1972), *cert. denied*, 409 U.S. 967 (1972); *United States v. Hanahan*, 442 F.2d 649, 655 (7th Cir. 1971).

These tapes, which were marked exhibits but never introduced as evidence, were labeled with various defendant's names. They were inadvertently taken with the jury during its deliberations. Defendants claim that they were prejudiced by this incident. The jury, however, never heard the tapes. Within fifteen minutes after the jury retired, a note from the forelady was delivered to the judge asking whether the tapes had been admitted and for an explanation why the jury had not heard them. They were almost immediately recovered. Defendants' objections are directed to the fact that the jury saw their names on the tapes; it never heard the tapes. Although delivery to the jury of an

exhibit, not admitted into evidence is regrettable and constitutes error, it only requires reversal if there is a possibility that the error was prejudicial. *United States v. Grady*, 185 F.2d 273 (7th Cir. 1950); *Osborne v. United States*, 351 F.2d 111 (8th Cir. 1965). The nature of these exhibits, tape recordings, weigh heavily against the possibility of their causing prejudice. Unlike other types of exhibits, their contents are not susceptible to observation without a device with which to play them back. Because the jury only had them a very short time, and because they never hear them, we cannot say that it was "substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Defendant Cason claims prejudicial error occurred when he was misidentified by a witness brought by the prosecution to impeach the testimony of Johnson. The purpose to be served by the witness was to identify Johnson as the man to whom Kammermeyer instructed him to give a set of golf clubs. Instead, when he made the courtroom identification, the witness pointed to Cason, who did not testify at the trial. Cason claims that this violated his right to choose whether or not to testify, and that he was not given an opportunity to cross-examine the witness. In view of what occurred following the incident, we do not find that sufficient prejudice resulted to require a mistrial. After the misidentification, the witness was immediately excused, his testimony stricken, and the jury admonished to entirely disregard it. The defense did not then attempt to cross-examine the witness.

All defendants argue that there was insufficient evidence to support their convictions. We find, however, that the evidence adduced does not support this claim, and was sufficient to support the jury's verdict. It is not the function of this court to weigh the credibility of the witnesses' testimony; that is the function of the jury.

In Count XXI defendants were charged with violations of 18 U.S.C. §§ 2, 1961, 1962, and 1963, prohibiting conduct in-

volving a pattern of racketeering activity. This count incorporated by reference some of the other counts of particular instances of racketeering. Because some of the evidence adduced at trial involved conduct not specifically charged in the other counts, defendants argue that there was a variance of proof from the indictment.

The policy behind not permitting proof to vary from what is charged in the indictment is twofold: to protect against the possibility of double jeopardy and to enable the defendant to adequately prepare a defense. In looking to the facts of this case, it can be seen that this policy has been served. There is no danger that defendants will be tried again for these charges, as the indictment was sufficiently specific as to the time period and alleged violations. Defendants were able to adequately prepare their defense. They had the opportunity for ample discovery, and the kickback payments proved at trial were violations of 18 U.S.C. §§ 1951 and 1961 charges existing throughout the indictment. Sections 1961, 1962, and 1963 involve a "pattern" of racketeering conduct. The Government is not prohibited from proving overt acts, other than those charged in the indictment, to show this pattern of activity.

The judgments in these appeals are affirmed.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 22, 1977

Before

Hon. Luther M. Swygert, Circuit Judge

Hon. Harlington Wood, Jr., Circuit Judge

Hon. A. Sherman Christensen, Senior District Judge*

United States of America, Plaintiff-Appellee, No. 75-1678 vs. Leonard Johnson, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division. No. 74-Cr-97 E

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable A. Sherman Christensen, Senior Judge, United States District Court for the District of Utah, sitting by designation.

APPENDIX C

STATUTES

Chapter 95—Racketeering

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of

Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Chapter 96—Racketeer Influenced and Corrupt Organizations

§ 1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: § 201 (relating to bribery), § 224 (relating to sports bribery), §§ 471, 472, and 473 (relating to counterfeiting), § 659 (relating to theft from interstate shipment) if the act indictable under § 659 is felonious, § 664 (relating to embezzlement from pension and welfare funds), §§ 891-894 (relating to extortionate credit transactions), § 1084 (relating to the transmission of gambling information), § 1341 (relating to mail fraud), § 1343 (relating to wire fraud), § 1503 (relating to obstruction of justice), § 1510 (relating to obstruction of criminal investigations), § 1511 (relating to the obstruction of State or local law enforcement), § 1951 (relating to interference with commerce, robbery, or extortion), § 1952 (relating to racketeering), § 1953 (relating to interstate transportation of wagering paraphernalia), § 1954 (relating to unlawful welfare fund payments), § 1955 (relating to the prohibition of illegal gambling businesses), §§ 2314 and 2315 (relating to interstate transportation of stolen property), §§ 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United

States Code, § 186 (dealing with restrictions on payments and loans to labor organizations) or § 501 (c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the filonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "Person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State of political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this Chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeer-activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of §2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A pur-

chase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal Penalties.

(a) Whoever violates any provision of § 1962 of this chapter shall be fined not more than $25,000.00 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of § 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source

of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of § 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Section 1341. Frauds and swindles.—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of,

loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (June 25, 1948, c. 645, § 1, 62 Stat. 763; May 24, 1949, c. 139, § 34, 63 Stat. 94.)

Rule 7. The Indictment and the Information

(a) **Use of Indictment or Information.** An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) **Waiver of Indictment.** An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) **Nature and Contents.**

(1) **In General.** The indictment or the information shall be a plain, concise and definite written statement of the es-

sential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) **Criminal Forfeiture.** When an offense charged may result in a cirminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) **Harmless Error.** Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) **Surplusage.** The court on motion of the defendants may strike surplusage from the indictment or information.

(e) **Amendment of Information.** The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendants are not prejudiced.

(f) **Bill of Particulars.** The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires. As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972.

APPENDIX D

Counts of Indictment

Count VI

[Pertinent so far as realleged in Count XV]

1. At all times pertinent hereto, the defendant, Leonard Johnson, was Business Manager of School District 189, East St. Louis, Illinois, in the Eastern District of Illinois.

2. At all times pertinent hereto the Business Manager of School District 189 occupied a position where through the exercise of discretion, bills and invoices submitted to the School District 189 are recommended or not recommended for payment.

3. School Districts 189 requires the acquisition of supplies and materials produced and manufactured in states other than the State of Illinois, and said articles move in interstate commerce from said manufacturerers and producers outside the State of Illinois for the use and benefit of School District 189, East St. Louis, Illinois; and James W. Kammermeyer, Jr. did contract and attempt to contract with School District 189, East St. Louis, Illinois for such supplies and materials.

4. In or about Mid August, 1973, the exact dates unknown to the Grand Jury, within the Eastern District of Illinois and elsewhere, the defendant did affect commerce by obtaining property from James W. Kammermeyer, Jr., a vendor doing business with School District 189, East St. Louis, Illinois, with said vendor's consent induced under color of official right, THAT IS TO SAY; the defendant did receive property in consideration for defendant's official acts as Business Manager of School District 189 so that the defendant would suspend his

independent and unbiased judgment on the merits when considering the payment of invoices and bills submitted to School District 189. In this regard, the defendant had received from James W. Kammermeyer, Jr. $400 in Travelers Checks for the purpose of taking a trip to Atlanta, Georgia; all in violation of Section 1951, Title 18, United States Code.

Count VIII

1. From on or about the month of March, 1974 to on or about the month of July, 1974, in the Eastern District of Illinois, the defendant, Charles Merritts, Sr., being duly elected a member of the Board of School District 189, East St. Louis, Illinois, and the defendant Leonard Johnson, an employee of School District 189, East St. Louis, Illinois, devised and intended to devise a scheme and artifice to defraud the citizens of East St. Louis and others of their right to have the School District 189's business and its affairs conducted honestly, impartially, free from deceit, trickery, corruption, fraud, and dishonesty.

2. It was part of said scheme and artifice that Charles Merritts, Sr. caused Marvin Charles Schwartz to submit fictitious invoices to the School District 189.

3. It was a further part of the scheme and artifice that Leonard Johnson arranged for a number of invoices to be prepared so that the fictitious billing would be more easily concealed.

4. It was a further part of the scheme and artifice that Marvin Charles Schwartz submit fictitious invoices 10502, 10503, 10504, 10505, and 10506 to the School District 189, totaling $4,498.48.

5. It was part of the scheme and artifice that at an official meeting of the Board of Education School District 189 of June 28, 1974, that the above invoices were approved for payment.

6. It was further part of the scheme and artifice that fictitious purchase orders were prepared and mailed out to Lehman, Inc. by School District 189.

7. It was further part of the scheme and artifice that not less than $4,498.48 would be paid to Charles Merritts, Sr.

8. From on or about July 1, 1974 to on or about July 8, 1974, in the Eastern District of Illinois, Charles Merritts, Sr. and Leonard Johnson, defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud, in attempting to do so did knowingly and wilfully cause School District 189, East St. Louis, and its employees or agents to place and cause to be placed in an authorized depository for mail, an envelope containing five purchase orders, dated July 1, 1974, totaling in the amount of $4,498.48, the aforesaid envelope being addressed to Lehman, Inc., to be sent and delivered by mail by the Postal Service, according to directions thereon, all in violation of Title 18, United States Code, Sections 2 and 1341.

Count XV

The Grand Jury charges and incorporates herein by reference paragraphs 1, 2 and 3 of Count VI as paragraphs 1, 2 and 3 of this Count, respectively.

4. On or about the 23rd day of July, 1974, within the Eastern District of Illinois and elsewhere, the defendant did affect commerce by obtaining property from James W. Kammermeyer, Jr., a vendor doing business with School District 189, East St. Louis, Illinois, with said vendor's consent induced under color

of official right, THAT IS TO SAY; the defendant did receive property in consideration for defendant's official acts as Business Manager of School District 189 so that the defendant would suspend his independent and unbiased judgment on the merits when considering the payment of invoices and bills submitted to School District 189. In this regard, the defendant had received a $1,500 kickback payment from James W. Kammermeyer, Jr., all in violation of Section 1951, Title 18, United States Code.

Count XIX

1. On October 2, 1974, in the Eastern District of Illinois, Leonard Johnson, defendant herein, while under oath as a witness before the Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Eastern District of Illinois and inquiring for said district in a case then and there pending before the said Grand Jury, did knowingly make a false material declaration.

2. At the time and place aforesaid, the said Grand Jury inquiring as aforesaid was conducting an investigation pertaining to possible violations of the criminal laws of the United States, to wit, among others, Section 1951 of Title 18, United States Code.

3. During the course of the investigation by the said Grand Jury it became and was material for the said Grand Jury to determine whether the defendant, while employed by School District 189 had received any money from James W. Kammermeyer, Jr., a vendor doing business with School District 189.

4. At the time and place aforesaid, the defendant, Leonard Johnson, while under oath, did knowingly declare in substance before the said Grand Jury with respect to the aforesaid material matter that he had never received any money from Mr. Kammermeyer.

5. The aforesaid declaration by the defendant, Leonard Johnson, was false and known by him to be false when made in that he had received money from James W. Kammermeyer, Jr., in violation of Title 18, United States Code, Section 1623.

Count XXI

1. From on or about the month of April, 1974, up to and including the date of the filing of this indictment, in the Eastern District of Illinois and elsewhere, the defendants, Charles Merritts, Sr., Dr. Fred Kimbrough, Harry Tharp, Roosevelt Peabody, being board members associated with School Board District 189, and the defendants Raymond Cason and Leonard Johnson, being employees of School Board District 189, an enterprise, the activities of which affected interstate commerce, unlawfully and knowingly did conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity, in that the defendants did unlawfully affect commerce by obtaining property from James W. Kammermeyer, Jr., a vendor doing business with School District 189, with said vendor's consent induced under color of official right, said acts being a violation of Title 18, United States Code, Section 1951, and the defendants Charles Merrits, Sr., and Leonard Johnson did, for the purpose of executing a scheme and artifice to defraud, wilfully cause School District 189 to use the United States mails; in violation of Title 18, United States Code, Section 1341. In this regard the Grand Jury incorporates by reference Counts VIII, XI, XII, XIII, XIV, XV, and XVI of this indictment. All in violation of Title 18, United States Code, Sections 1961, 1962, 1963 and 2.